Supreme Court, U.S.
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No. 98-1942

IN THE

Supreme Court of the United States

NIKE, INC.,

Petitioner,

v.

WAL-MART STORES and HAWE YUE, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

The petition accurately lists the parties to the proceeding.

Neither Respondent has a parent corporation and no publicly held company owns 10% or more of the stock of either Respondent.

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SUMMARY OF ARGUMENT

Hawe Yue, Inc. ("HYI") and Wal-Mart Stores, Inc. ("Wal-Mart") respectfully request that this Court deny Nike, Inc.'s ("Nike") Petition for a Writ of Certiorari ("Petition"). The Petition raises no issue warranting review by this Court. The decision of the United States Court of Appeals for the Federal Circuit ("Federal Circuit"), holding that a patentee seeking an infringer's profits must first comply with the marking section of the Patent Act, 35 U.S.C. § 287(a), is correct and does not raise any compelling issue of federal law or policy.

The statutory construction of patent law — in this case, the statutory prerequisites to a design patentee's ability to recover an infringer's profits — is properly entrusted to the sound judgment and expertise of the Federal Circuit. The Federal Circuit decision at issue properly construes the marking statute, is consistent with over a century of judicial authority, and carries out the legislative intent behind the marking statute ("to give notice and thus prevent innocent infringement") (App. 21). Nike's Petition, in contrast, ignores judicial precedent and legislative intent and finds most of its support in decisions interpreting statutory provisions other than the one at issue in this case, the marking statute.

REASONS FOR DENYING THE WRIT

I.

THE FEDERAL CIRCUIT DECISION IS CONSISTENT WITH OVER A CENTURY OF PRECEDENT.

This case involves the interpretation of the marking statute, 35 U.S.C. § 287(a), which sets forth the notice prerequisites to a patentee's recovery of damages for infringement.[1] The Federal Circuit, in a unanimous opinion written by Circuit Judge Newman and supported by Chief Judge Mayer and Circuit Judge Plager, determined that the marking statute's notice requirement applies to a design patentee's recovery for infringement, regardless of the type of monetary relief sought.[2]

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1. The marking statute, 35 U.S.C. § 287(a), provides, in pertinent part:

> Patentees . . . may give notice to the public that the same is patented either by fixing thereon the word "patent" or the abbreviation "pat.", together with the number of the patent, or when, from the character of the article, this can not be done, by affixing to it, or to the package wherein one or more of them is contained, a label containing a like notice. In the event of a failure to so mark, no damages shall be recovered by the patentee in any action for infringement, except on proof that the infringer was notified of the infringement and continued to infringe thereafter, in which event damages may be recovered only for infringement occurring after such notice. Filing of an action for infringement shall constitute such notice.

2. Following the Federal Circuit's decision, Nike filed a Combined Petition for Rehearing and Suggestion for Rehearing (Cont'd)

In its opinion, the Federal Circuit carefully reviewed the "parallel but separate evolutions of the marking statute and the remedies statute for patent infringement." App. 6. This examination of the statutory text, judicial interpretations, and legislative history led the Federal Circuit to its ultimate conclusion "that the marking requirement has always applied, and continues to apply, to both recovery of the infringer's profit under § 289, and recovery of damages, however measured, under § 284." App. 6.

This conclusion was identical to earlier opinions of the Eighth and Third Circuits holding, respectively, that the "weight is overwhelming" and that there is "no escape from the conclusion" that the marking statute applies to actions seeking an infringer's profits. *Flat Slab Patents Co. v. Turner*, 285 F. 257, 269 (8th Cir. 1922) (cited at App. 17); *Franklin Brass Foundry Co. v. Shapiro & Aronson, Inc.*, 278 F. 435, 442 (3d Cir. 1921) (cited at App. 16).

The prior precedent is so overwhelming because its interpretation is consistent with the undisputed purposes of the marking statute:

> (1) helping to avoid innocent infringement, *see Wine Ry. Appliance Co. v. Enterprise Ry. Equip. Co.*, 297 U.S. 387, 395 (1936); *Motorola, Inc. v.*

(Cont'd)

En Banc. Petition at 8. The Federal Circuit denied the combined petition and suggestion for rehearing. App. 38. In its opening brief on appeal after remand, Nike again asked the Federal Circuit to revisit its decision on the marking statute. The Federal Circuit again denied that appeal. App. 43.

> *United States*, 729 F.2d 765, 772 (Fed. Cir. 1984); (2) encouraging patentees to give notice to the public that the article is patented, *see Amsted Industries v. Buckeye Steel Castings*, 24 F.3d 178, 185 (Fed. Cir. 1994); *American Medical Systems v. Medical Eng'g Corp.*, 6 F.3d 1523, 1537 (Fed. Cir. 1993); and (3) aiding the public to identify whether an article is patented, *see Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 162 (1989).

App. 14.

The soundness of the prior precedent is also confirmed by the history of the marking statute, which the Federal Circuit traced in its decision. The early patent statutes contained no marking requirement. Patents were public records and all persons were "bound to take notice of their contents." *See Boyden v. Burke*, 55 U.S. (14 How.) 575, 582-83 (1852). A duty to mark was imposed by the Patent Act of 1842; a patentee was subject to fines for failing to mark patented articles in accordance with that statute. Patent Act of 1842, 5 Stat. 543, 544.

In 1861, the marking statute was amended to delete the statutory penalty while substituting a limitation on a patentee's right to recover for infringement for failure to mark.[3] Patent Act of 1861, 12 Stat. 246, 249. It has not

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3. A patent holder may comply with the marking statute by providing notice in one of two ways: (1) provide *actual* notice by filing suit against an infringer; or (2) provide *constructive* notice by consistently and continuously marking substantially all of the

(Cont'd)

been substantially changed since then. In cases decided around the time of the enactment of the 1861 marking statute, the Supreme Court and lower courts used the word "damage" or "damages" to encompass the patentee's monetary recovery whether it was derived from the infringer's profits or the patentee's losses. App. 15-16 (citing *Dean v. Mason*, 61 U.S. (20 How.) 198, 203, 15 L. Ed. 876 (1857) (using "profits" to define "damages" and stating that "the amount of profits . . . in general, is the damage done to the owner of the patent")).

Similarly, after the Patent Act of 1861, courts, including the Supreme Court, generally used the word "damages" in the broad sense of monetary recovery for infringement, whether the amount was measured by the infringer's profit or the patentee's loss. App. 16 (citing *Mowry v. Whitney*, 81 U.S. (14 Wall.) 620, 653, 20 L. Ed. 860 (1871) (referring to the infringer's profits as "the measure of [the patentee's] damages"); *Birdsall v. Coolidge*, 93 U.S. (3 Otto) 64, 69, 23 L. Ed. 802 (1876) (stating that the infringer's profits were "the proper measure of damages")). Judicial interpretation of the marking statute has continued steadily since those early Supreme Court decisions with "the great

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(Cont'd)
patented products being distributed to the public. 35 U.S.C. § 287; App. 22. In this case, Nike sought HYI's and Wal-Mart's profits using the constructive notice provision of the marking statute. On remand, the District Court determined that Nike failed to prove that it complied with that provision (by failing to prove that it marked substantially all of the patented shoes being distributed to the public). App. 39. Hence, Nike was only entitled to recover profits for the period after which it provided actual notice by filing suit. The Federal Circuit affirmed that remand decision *per curiam*. App. 43.

weight of the authority holding that the marking statute applies to actions for recovery of the infringer's profits."[4] App. 16-17.

In what Nike itself describes as the "leading treatise on Patent Law," Professor Chisum states that "a majority [of courts] held that profits did constitute such 'damages'

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4. *See, e.g., Horvath v. McCord Radiator & Mfg. Co.*, 100 F.2d 326, 337 (6th Cir. 1938) (no action for an accounting of profits unless the plaintiff marks or gives actual notice); *O'Nate v. Bahr*, 67 F.2d 180, 182 (9th Cir. 1933) (notice is required to recover "damages or profits"); *Van Meter v. United States*, 47 F.2d 192, 196 (2d Cir. 1931) (failure to mark precludes recovery of infringer's profits prior to actual notice); *Franklin Brass Foundry Co. v. Shapiro & Aronson, Inc.*, 278 F. 435, 442 (3d Cir. 1921) ("no escape from the conclusion that the word 'damages,' as used in R.S. Sec. 4900 [the marking statute], includes profits"); *Gibson v. American Graphophone Co.*, 234 F. 633, 635 (2d Cir. 1916) (recovery by accounting for profits limited to acts of infringement after notice is given); *American Caramel Co. v. White*, 234 F. 328, 333 (7th Cir. 1915) (same); *Lichtenstein v. Phipps*, 168 F. 61, 62 (2d Cir. 1909) (proof of notice required "to entitle [patentee] to recover damages, profits, or statutory penalty.") In 1922 the Eighth Circuit conducted an exhaustive review of Supreme Court and lower court case law, and concluded:

> [T]he great weight of authority by expressed holding and by inferences from judicial language is that the term 'damages' in section 4900 [the marking statute] is used in its general sense and includes profits as a measure of damages. There are so many cases to this effect and it may accurately be said that their weight is overwhelming as compared with those to the contrary.

Flat Slab Patents Co. v. Turner, 285 F. 257, 269 (8th Cir. 1922).

under the Marking Statute."[5] App. 19 (citing 7 D. Chisum, *Patents* § 20.03[7] at 20-530 (Rel. 46, 1993)). The Federal Circuit adhered to this established precedent in deciding that a design patentee must give notice in compliance with the marking statute before recovering an infringer's profits.

In its Petition, Nike cites several district court opinions supporting its interpretation of the marking statute, one of which is the District Court opinion in this case. Another is an unreported 1997 decision which acknowledges that:

> It is clear that the majority of decisions include profits within the definition of damages for purposes of the marking statute. . . . Such a rule . . . is supported by one of the purposes of the marking statute, which is to induce compliance by patent owners with the marking requirement and thus prevent deception of the public by the appearance of apparently unpatented (and, therefore, copyable) products.

Aerogroup Int'l, Inc. v. Marlboro Footworks, Ltd., 1997 WL 83395, *6 (S.D.N.Y. 1997).

The Federal Circuit decision in this case, on the other hand, follows prior appellate court and Supreme Court pronouncements on this issue. This decision needs no review.

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5. Another leading patent treatise similarly states that "damages" as used in the marking statute includes profits. 8 *Deller's Walker on Patents* §§ 184, 759 (2d ed. 1973).

II.

NIKE RAISES NO IMPORTANT QUESTION OF FEDERAL LAW.

The Federal Circuit's construction of the narrow issue presented here — the marking statute's prerequisites to a design patent holder's recovery of an infringer's profits — is not worthy of this Court's review. Indeed, Congress established the Federal Circuit to decide legal issues such as this and save this Court's resources by "provid[ing] a new forum for the definitive adjudication of selected categories of cases." S. Rep. No. 97-275 (1982) *reprinted in* 1982 U.S.C.C.A.N. 11, 13. Congress selected patent cases to be one of the categories entrusted to the sound expertise of the Federal Circuit.

As intended by Congress, the entrustment of exclusive jurisdiction in patent appeals to the Federal Circuit has also brought increased stability to the field of patent law. *See id.* at 15 ("The establishment of the Court of Appeals for the Federal Circuit . . . provides a forum that will increase doctrinal stability in the field of patent law."). The Federal Circuit used its expertise in this case to render a decision that brings added stability by following judicial precedent and helping to fulfill the purposes of the marking statute — *i.e.*, to encourage patentees to provide notice of patent rights and avoid innocent infringement.

The alternative interpretation espoused by Nike would thwart the objectives of the marking statute. Patentees would have little incentive to give notice of their patent rights, turning design patent law into a kind of strict liability cause of action — once a patent issued, the infringer's profits

would be fully available regardless of notice, willfulness, or knowledge. This is not what Congress intended.[6]

III.

THE FEDERAL CIRCUIT COMMITTED NO ERROR IN ITS METHODOLOGY.

A. Historical Review of Judicial Precedent and Legislative Intent was Appropriate.

Nike argues that this Court should review the Federal Circuit's decision because, in arriving at its decision, the Federal Circuit reviewed the history of the relevant statutory provisions in this case. This argument is misleading. The Federal Circuit did not rely solely on congressional materials to determine the meaning of the marking statute. Rather, it traced *judicial* interpretations of the marking and remedies statutes to confirm its view that "damages" under the marking statute includes "profits."

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6. Nike blames the Federal Circuit decision rather than its own marking practices for the reduction in the amount of its "record" judgment. Its marking practices and the proof assembled to support its marking, however, are the true source of Nike's complaint. Indeed, in this case, Nike did not claim to reach full marking until almost five months *after* the patent was issued. App. 40. At that point, only 15% of the entire production cycle remained. *Id.* Further, despite the fact that large quantities of the patented product were in the distribution pipeline, Nike made no effort whatsoever to mark those shoes and did not notify any of its retailers, not even its wholly-owned retailers, that the patent had issued. App. 41-42. And, as the District Court found on remand, Nike's own exhibits "undermined" its claims of marking. *Remand Hearing*, July 10, 1998, Tr. 44.

As the Federal Circuit explained, "[a]lthough a statute clear on its face does not warrant resort to history, inquiry is proper to determine whether ambiguity has invaded an apparently clear text." App. 6. (citing *Mansell v. Mansell*, 490 U.S. 581, 592 (1989) (where a literal reading of a statute would thwart the purposes of the statute, inquiry into the statute's history is appropriate); *accord Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978)). Here, the Federal Circuit concluded that "damages" as used under § 287 was sufficiently ambiguous that resort to judicial precedent alongside statutory history was appropriate.

Moreover, the Federal Circuit correctly concluded that Nike's (and the District Court's) interpretation of the marking statute would thwart the purposes of the provision.

> Should this court now limit the word "damages" in the marking statute to a compensatory recovery at law, we ignore the history of marking as applied to recovery of profits in equity, and negate the purpose of the marking statute, i.e., to give notice and thus to prevent innocent infringement, *see Wine Railway*, 297 U.S. at 395, 56 S. Ct. at 530.

App. 21. The Federal Circuit's interpretation, which, as is set forth *supra*, is supported by a wealth of judicial precedent, is also "strongly reinforced by historical expressions of congressional concern about notice for design patent infringement."[7] App. 18.

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7. Indeed, in this case, the District Court found HYI and Wal-Mart to be innocent infringers. App. 30 ("There is no evidence (Cont'd)

Lastly, the outcome would have been the same even if without resort to legislative history as Congress implicitly adopted the prior judicial interpretations of the marking statute:

> In the 1952 Act, as in previous marking re-enactments, the case law requirement of marking in connection with an accounting for profits, *e.g.*, *Dean v. Mason*, *Mowry v. Whitney*, and/or *Birdsall v. Coolidge*, was neither revoked nor discussed. 'Since we must recognize that the Congress was fully aware of judicial constructions of a prior statute during the enactment of subsequent legislation encompassing the prior statute, our interpretation of the subsequent legislation must include the prior judicial constructions unless they were expressly revoked by Congress.'

App. 18 (emphasis added) (quoting *Motorola, Inc. v. United States*, 729 F.2d 765, 770 (Fed. Cir. 1984)) (citing *Blake v. McKim*, 103 U.S. (13 Otto) 336, 339, 26 L. Ed. 563 (1880)).

Adhering to the doctrine of stare decisis, the Federal Circuit decision in this case follows that precedent. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73

(Cont'd)
that either defendant had knowledge of the patent prior to its receipt of the January 18, 1996 letter from Nike's counsel enclosing a copy of a complaint for infringement.") The evidence showed that HYI's employees checked the subject shoes on two separate occasions (including one occasion five months *after* Nike's patent had issued), but did not find any marking for the design patent at issue. Trial Tr. 337-347.

(1989) ("Considerations of stare decisis have special force in the area of statutory construction, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.").

B. The Decision Serves the Purposes of the Marking Statute.

Nike points to the "anomaly" that the term "damages" is interpreted differently in different sections of the Patent Act as a basis for this Court's review. The Federal Circuit squarely addressed this argument and, quoting Supreme Court precedent, explained that " '[i]t is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the Legislature intended it should have in each instance.' " App. 20 (quoting *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932); and citing *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 262 (1995) ("meaning [of words] well may vary to meet the purposes of the law"); *accord District of Columbia v. Carter*, 409 U.S. 418, 421 (1973)). Here, the Federal Circuit interpreted the marking statute in a way that fulfills the statute's purposes.

The result is also consistent with Congress' construction of the Patent Act on another level: no matter what type of damages sought (losses or profits) and no matter what type of patent (utility or design), Congress requires a patentee to give notice of its patent rights before it may recover money. Hence, no patentee may recover money unless and

until it gives notice of its claimed patent rights. This doctrinal consistency and certainty in carrying out its acts is exactly what Congress envisioned in creating the Federal Circuit. *See* S. Rep. No. 97-275 (1982) *reprinted in* 1982 U.S.C.C.A.N. 11, 16 ("[U]niformity in the law will be a significant improvement from the standpoint of the businesses that rely on the patent system. Business planning will become easier as more stable and predictable law is introduced.").

C. Congress Did Not "Silently Abandon" the Marking Statute.

Based on the omission of the phrase "knowing that the same has been so applied" from the 1952 codification of the additional remedy for design patent infringement, 35 U.S.C. § 289 (not the marking statute), Nike argues that Congress revoked the marking statute insofar as it applies to the recovery of profits for design patent infringement. Petition at 10. This argument is specious.

As the Federal Circuit explained, Nike's interpretation is contrary to the repeated pronouncements of legislative intent: "With such steady emphasis on knowledge or notice of the patent, as a matter of fairness, we doubt that both actual and constructive notice were silently abandoned. . . ." App. 19. Rather, as the Federal Circuit explained, Congress likely omitted the language as being redundant since courts already interpreted the *marking statute*, 35 U.S.C. § 287(a), to include the recovery of an infringer's profits for design patent infringement. App. 19. "To view it otherwise would be to accept that a major substantive change was made in silence or by implication." *Id.*

D. *Aro Mfg Co.* Does Not Govern this Case.

Lastly, Nike seeks to create a conflict between *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476 (1964), and the Federal Circuit decision here. But the Federal Circuit made clear that those decisions do not conflict. *Aro* dealt with the remedies available for infringement of utility patents, not design patents, which evolved separately from, and with different purposes than, design patent infringement recovery. *See* App. 12-14. Further, although the *Aro* decision clarified the measure of recovery for utility patent infringement, that decision did not involve the marking statute, 35 U.S.C. § 287(a).[8]

And, as Nike itself concedes, the section of *Aro* upon which Nike relies is *at best* a plurality; it is not binding precedent.[9] Nike also acknowledges that the section has been

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8. Nike's reliance on *Duplate Corp. v. Triplex Safety Glass Co.*, 298 U.S. 448 (1936), is similarly misplaced. That case involved recovery for the infringement of a *process* patent and again had nothing to do with the marking statute.

9. Justice White's concurrence does not support the "plurality" opinion as Nike interprets it. Indeed, Justice White specifically distinguishes the *Aro* decision from the marking statute:

> In any event, § 287 [the marking statute], as my Brother Brennan says, is not applicable here under *Wine Ry. Appliance Co. v. Enterprise Ry. Equipment Co.*, 297 U.S. 387, 56 S. Ct. 528, because the patentee has not manufactured the article and has had no opportunity to mark it in accordance with § 287.

Aro, 377 U.S. at 514. Consistent with legislative concerns regarding notice, Justice White went on to find that "[h]ere the patentee gave notice to Aro and I think it is liable on Ford tops sold by it after that date, but not before, unless it had knowledge from other sources." *Id.*

dubbed as "*obiter dictum*" by at least one commentator, and that Professor Chisum believes that the section "weakens" the rest of the *Aro* opinion. Petition at 22.

CONCLUSION

Based on the foregoing, HYI and Wal-Mart respectfully request that this Court deny Nike's Petition for a Writ of Certiorari.

Respectfully submitted,

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